Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1626

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER, JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., and HANS JUHR, KENNETH J. JUHR and DAN JUHR, dba JUHR & SONS, et al.,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

Reply to Statement of the Case (Res. Br. 2-3)

A. The district court rejected 701's contention that its members could meet AGC's needs for concrete pumping work. In its oral opinion based on a complete record, the court said:

> "Some of the facts indicated quite clearly that some of those contractors were involved in pumping operations of size and duration to lead me to believe that there certainly would not have been available for all AGC members, during the year

1973, sufficient pumping capacity by contractors who had a contract with 701. . . . [S]ome of these disputes centered around projects on which 701-oriented pumping contractors would be available and some where there was no such real availability." (Pet. A 32)

B. While contractors who employ 701 members were not parties to the § 10(k) proceeding, any interest they might have in the dispute was represented by 701. Their concern over competing with members of Northwest for subcontracts is not an interest that can be considered by the Board. See *Connell Co.* v. *Plumbers and Steamfitters*, (1975) 421 U.S. 418.

II.

While courts have jurisdiction under § 301 to enforce labor contracts (Res. Br. 5), the Board's § 10 (k) ruling is the "superior authority", and "if the employer's aciton [is] in accord with that ruling, it would not be liable for damages under § 301." *Carey* v. *Westinghouse Electric Corp.*, (1964) 375 U.S. 261, 272. The question, therefore, is not whether the subcontractor clause in the AGC-701 contract "directly conflicts" with the Board's decision. It is whether enforcement of the clause circumvents the Board's "superior authority" and makes its decision ineffective, contrary to national labor policy as applied to jurisdictional disputes. In the construction industry, which is characterized by subcontracting, the enforcement of a subcontractor clause nullifies an order under § 10(k) that awards such subcontracted work

and "all similarly disputed work" to another union.

III.

Respondent's concern (Res. Br. 7) for work preservation clauses, see *National Woodwork Manufacturers Association* v. *NLRB*, (1967) 386 U.S. 612, is misplaced, unless such clauses, as applied to subcontractors, are regarded as a means of eroding jurisdictional awards under § 10(k).* Awards under § 10 (k) admittedly are not controlled by a contract work assignment clause, and this kind of clause, like others, is subject to the "superior authority" of a Board decision determining that the work assignment it provides is not a proper one.

IV.

Respondent's contention (Res. Br. 6-8) that the jurisdictional dispute will disappear if AGC contractors are required to subcontract to subcontractors using respondent's members, is based on a misconception. Doing so would nullify the Board's order, but it would scarcely resolve the dispute. Whatever handicaps the Teamsters face in protecting their jurisdiction as established by the Board, the dispute, at best, will persist on other levels. Respondent seeks only to conduct this jurisdictional dispute away from the Board in negotiations and arbitrations to which Teamsters are not parties, a procedure which will transfer, but will not terminate it.

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* This case does not involve work preservation, but an aggressive effort to expand 701's jurisdiction.

CONCLUSION

Respondent's claims against AGC members were resolved by the Board's assignment of work to Teamsters on identical facts, in a decision extending to "all similarly disputed work." The Court should consider the destructive impact on the "superior authority" of that award of a court of appeals decision that imposes damages on employers who act "in accord with that ruling." *Carey* v. *Westinghouse Electric Corp.*, supra, (1964) 375 U.S. 261, 272.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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